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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947.

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**No. 763**

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MRS. FRANK JOWERS, ET AL.,
Petitioners,

*versus*

DOWELL, INCORPORATED,
Respondent.

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT**

**And**

**BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.**

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# SUPREME COURT OF THE UNITED STATES

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## No.

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**Petitioners,**

*versus*

**DOWELL, INCORPORATED,**
**Respondent.**

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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*To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:*

Comes now MRS. FRANK JOWERS, petitioner, individually and as tutrix for her three minor daughters, and respectfully petitions this Honorable Court to grant writ of certiorari to review opinion and judgment of the United States Circuit Court of Appeals, Fifth Circuit, rendered and entered on February 18, 1948, in the case lately pending in the state court, styled: DOWELL, INCORPORATED, vs. MRS. FRANK JOWERS, ET AL., reversing a judgment of $62,000.00 for petitioner and the Hartford Accident & Indemnity Company, insuror of the Pen-

rod Drilling Company (employer of petitioner's late husband), which said judgment of the United States Circuit Court of Appeals, Fifth Circuit, became final on the 18th day of March, 1948, by the overruling, by that court, of petitioner's motion for rehearing.

**Opinion of the Court Below.**

The opinion of the United States Circuit Court of Appeals, Fifth Circuit, which petitioner here seeks to have reviewed, is reported in .... F. (2d) .... and appears at pages 291 to 307 of the printed record filed herewith.

**Summary Statement of the Matter Involved.**

Your petitioners, the widow and children of the late Frank Jowers, filed this suit, sounding in tort, in the Second Judicial District Court in and for the Parish of Bienville, Louisiana, on October 16, 1946.

Respondent obtained an order transferring the case to the United States District Court, in and for the Western District of Louisiana, on the ground of diversity of citizenship.

Petitioners alleged in their complaint that Frank Jowers, their late husband and father, was employed by the Penrod Drilling Company as a driller on a high-pressure gas well, known as the Dee Van Zandt No. 1, at the time of an explosion in said well, occurring on October 29, 1945, and resulting in Jowers' death.

Petitioners further alleged that when the well had been drilled to the point of production, in a high-pressure gas formation, Dowell, Inc., specialists in the administra-

tion of chemical processes to non-porous oil or gas formations, was employed by Penrod to acidize the well for the purpose of increasing the production of natural gas. At the time Dowell, Inc., took over control of the well, for the purpose indicated, Jowers' employer had caused to be placed in the flow-line of the well a device known as a choke—a safety device—to prevent the well from blowing out, going wild, and out of control, and to prevent damage or injury to persons and property; that some member of the Dowell, Inc., crew removed the choke without advising Jowers or the drilling crew, and that when the well was turned back to the drilling crew to bring into production, it exploded, went wild, and Frank Jowers was killed. Petitioners sought to recover the sum of $220,871.60, based on the long life expectancy of Jowers, his earning capacity of $140.00 per week, and other grounds.

Respondent answered the demands of petitioners with a general denial, and trial was had; and when all of the evidence was in, respondent filed what it termed a motion for directed verdict, without setting forth any specific reasons or grounds therefor (R. 268).

Respondent appealed to the United States Circuit Court of Appeals, Fifth Circuit, from the judgment entered upon the verdict and from an order denying its motion for judgment *non obstante veredicto.*

The United States Circuit Court of Appeals, Fifth Circuit, reversed and remanded the cause for new trial (R. 291 to R. 307), and after rehearing was timely filed, the same was refused without written opinion (R. 313).

**Jurisdiction.**

The jurisdiction of this Court was invoked under Section 240(a) of the Judicial Code, as amended by act of February 13, 1925 (Title 28, U.S.C.A. 347).

**Questions Presented.**

The questions presented are:

1. Whether a federal appellate court can consider the sufficiency of the evidence, where a so-called motion for directed verdict only moves that *"the Court do direct the jury to render a verdict in favor of your defendant"*, particularly where unsupported on oral grounds, in the face of Rule 50(a) of the Federal Rules of Civil Procedure.

2. Whether a federal appellate court can substitute its opinion of the facts proven, or inferences from those facts, for that of the jury, particularly where such opinion admits that upon one important factual point confusion arises in the record (R. 295).

3. Whether a federal appellate court can disregard substantial facts in the record, upon which a jury's verdict is predicated, by determining the legal sufficiency of petitioners' case on facts favorable only to respondent.

4. Whether the circuit court could disregard the following proven facts, and inferences from those facts, establishing: (a) That the choke was a safety device, placed in the flow-line of the subject well by petitioner's late husband, to prevent the very accident and explosion which

occurred and resulted in his death; (b) that sometime subsequent thereto, said choke was removed by some human agency; (c) that respondent's employees had the sole motive for having removed it; and (d) that they had the sole opportunity to have removed it; in holding that petitioner made out no case for the jury, such reasoning being tantamount to saying that a litigant cannot prove a case by circumstantial evidence, thus being contrary to decisions of both state and federal courts (*Lavender v. Kurn*, 327 U. S. 645; *North River Insurance Company v. H. H. Bain Roofing Company*, 30 So. (2d) 139; 20 Am. Jur. 1943, verbo "Evidence", Sec. 1189).

5. Whether a federal appellate court can reverse and remand for a new trial an instruction of a trial judge, prepared by respondent to cover the testimony of a rebuttal witness, because "*we think the trial judge should have drawn it carefully and explicitly in his charge to the jury by an explanation more detailed than the brief charge given at the request of the appellant*" (R. 300). (Italics ours).

6. Whether a federal appellate court can reverse and remand on an erroneous instruction given by trial judge in a case not involving unusual or exceptional circumstances, in the absence of any objection, and raised for the first time on appeal in the face of Rule 10 of the Fifth Circuit Court of Appeals, and Rule 51 of the Federal Rules of Civil Procedure, 28 U.S.C.A. following Section 723(c).

**Reasons for Granting Writ.**

Petitioners assign as reasons for the issuance of writ of certiorari, the following:

1. An interpretation by this Court of Rule 50(a), Federal Rules of Civil Procedure, which provides that a motion for directed verdict "shall state the specific grounds therefor", presents a question of public importance.

2. That the decision of the Fifth Circuit, on the above point, is contrary to a decision of the Fourth Circuit, in *Virginia Carolina Tie & Wood Co. v. Dunbar*, 106 F. (2d) 383, and the Third Circuit in *Ryan Distributing Co. v. Caley*, 147 F. (2d) 138, where the courts mentioned specifically held that sufficient grounds should be set forth in a motion for directed verdict as would fairly apprise the court as to movant's position with respect thereto.

3. The opinion of the Fifth Circuit, on the sufficiency of the evidence, clearly reveals an invasion of matters within the exclusive province of a jury, in that the opinion below is in conflict with time-honored decisions of this Court, and of other circuit courts, holding that evidence must be viewed, on appeal, in the strongest and most favorable manner to appellee; and that the facts proven, and inferences from such facts, are the sole concern of the jury (*Delk v. St. Louis & San Francisco R. R. Co.*, 220 U. S. 580, 55 L. Ed. 590; *Gunning v. Cooley*, 74 L. Ed. 720, 281 U. S. 80, 50 S. Ct. 231; *Johnson v. Dierks Lumber & Coal Co.*, 130 F. (2d) 115, C. C. A. Ark. 1942).

4. The above point is given impetus by a casual reading of the circuit court's opinion when, on a material factual issue, that court admits that confusion exists in the record, and that there was not a "total absence of evidence" tending to prove motive for respondent to have removed the choke, particularly where the court totally disregarded all the evidence in the case pointing to the conclusion that respondent's agents had the sole opportunity to have removed the choke (R. 295-296).

5. The Fifth Circuit reversed and remanded this cause because of an erroneous instruction, given without objection, in the face of Rule 10 of that court, adopting Rule 51 of the Federal Rules of Civil Procedure, 28 U.S.C.A. following Section 723(c), which latter rule provides that no party may assign as error the giving, or failing to give, an instruction, unless he distinctly presents to the trial court his grounds for objection.

6. The Fifth Circuit reversed and remanded because of an erroneous instruction, given without objection, and urged for the first time in the reviewable court, the subject matter of the charge being prejudicial to petitioners only; and which did not involve unusual or exceptional circumstances, contrary to the reasoning of this Court in *Blair v. Oesterlein Machine Company*, 275 U. S. 220, 72 L. Ed. 249, 48 S. Ct. 87; *Hormel v. Helvering*, 312 U. S. 552, 83 L. Ed. 1037, 61 S. Ct. 719, and *Duignan v. U. S., et al.*, 274 U. S. 195, 47 S. Ct. 566, 71 L. Ed. 996.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Cir-

cuit Court of Appeals, for the Fifth Circuit, commanding that court to certify and send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case, No. 12,020, entitled on its docket "DOWELL, INC., Appellant, v. MRS. FRANK JOWERS, ET AL., Appellees", and that said judgment of the said Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and for such other relief as the Court may deem proper.

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Attorney for Petitioner.

Booth, Lockard & Jack,
Truett L. Scarborough,
Of Counsel.

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

*May It Please the Court:*

The United States Circuit Court of Appeals, Fifth Circuit, in its opinion in this cause, erred:

### Assignment of Errors.

I.

In holding that the motion for directed verdict, filed by respondent at the conclusion of all the evidence, constituted such a motion within Rule 50(a), Federal Rules of Civil Procedure, as would have permitted the lower court to have reviewed the sufficiency of the evidence.

II.

In substituting its opinion and appraisal of the facts, and inferences from those facts, for that of the jury, particularly where the opinion admits a state of confusion in the record on a material factual point in the case, and where the opinion totally disregards another important factual issue, to-wit: That respondent's agents had the sole opportunity to have committed the act of negligence resulting in the death of petitioner's husband, *i. e.*, the removal of the choke.

III.

In failing to hold that respondent had such exclusive control of the drilling rig during the progress of its work and until the operation was turned back to the drilling

crew, whereupon the accident immediately occurred, and thus apply the doctrine of *res ipsa loquitur*, in accordance with this Court's decisions in *Jesionowski v. Boston & M. R.*, 329 U. S. 452, 67 S. Ct. 401, 169 A. L. R. 947; *Sweeney v. Erving*, 228 U. S. 233, 57 L. Ed. 815, 33 S. Ct. 416; *Johnson v. U. S.*, 92 L. Ed. 360, and the Supreme Court of Louisiana in *Hake v. Air Reduction Co.*, 210 La. 810; 28 So. (2) 441.

IV.

In reversing and remanding the cause for a new trial, because of an erroneous instruction given to the jury without objection and urged for the first time on appeal—no exceptional circumstances being involved.

## ARGUMENT.

Rule 50(a) of the Federal Rules of Civil Procedure provides:

> "(a) WHEN MADE: EFFECT. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. *A motion for a directed verdict shall state the specific grounds therefor.*" (Italics ours).

At the conclusion of the trial, appellant filed what it termed a motion for directed verdict (R. 268), as follows:

> "Now comes Dowell, Incorporated, defendant in the above numbered and entitled cause, and after conclusion of all the evidence in this cause, respectfully moves the Court to direct the jury to render a verdict in favor of your defendant, dismissing plaintiff's suit at her cost."

We submit that this motion does not comply with Rule 50(a) in that it fails to set forth any reasons or grounds upon which it is predicated, which is made mandatory by the last sentence of the rule. If so, it is just as if no motion was filed; and if this is true, the present status of this action falls within a Fifth Circuit decision, *Baten, et al., v. Kirby Lumber Corporation*, 103 F. (2d) 272. Justice Sibley, writing for the court, said (at p. 274):

> "Whether the verdict is authorized by the evidence is a question not reserved in the trial. *The defendants went to the jury without challenging its sufficiency, and no error can be attributed to the judge thereabout. Federal appellate courts do not directly review jury verdicts but only rulings of the judge which may have affected the verdict.* Rule of Civil Procedure 50, 28 U.S.C.A. following Section 723(c), does not do away with, but emphasizes the necessity of a motion for a directed verdict to raise the legal question whether the evidence is sufficient." (Italics ours).

The first case, seemingly, to discuss this requirement of Rule 50(a) is *Virginia Carolina Tie & Wood Co. v.*

*Dunbar*, 106 F. (2d) 383, wherein plaintiff's counsel moved for a directed verdict but did not state any grounds in his motion. On appeal, in disposing of the problem raised by the motion, the Court said:

> "Prior to the adoption of this rule, there was conflict in the decisions of the federal courts as to the necessity for stating grounds of a motion for directed verdict. * * * Rule 50(a) has settled that conflict, however, by providing that 'a motion for directed verdict shall state the specific grounds therefor'. MOORE FEDERAL PRACTICE, Vol. 3, p. 3107; SIMPKINS' FEDERAL PRACTICE, 3rd Ed., p. 480. And we think it important that this requirement of the rule be observed, particularly in view of the enlarged powers granted the court with respect to such motions by Rule 50(b) as otherwise judgment might be entered on such a motion after the close of the trial and on a ground which could have been met with proof if it had been suggested when the motion was made. We do not mean to say that technical precision need be observed in stating the grounds of the motion, but merely that they should be sufficiently stated to apprise the court fairly as to movant's position with respect thereto. We doubtless have the power to consider such motion even though the grounds be not stated, if in our opinion this is necessary to prevent a miscarriage of justice; but in ordinary cases, such as that which is here presented, the grounds of the motion must be stated to avail movant in this court."

In *Ryan Distributing Co. v. Caley*, 147 F. (2d) 138, the Court held that the motion need not state the grounds with precision or with technical skill, but, nevertheless, held that some specific ground must be given. The Court said:

> "Specific grounds are required so that judgment may not be entered 'on a ground which could have been met with proof if it had been suggested when the motion was made.' Nevertheless '* * * technical precision need not be observed in stating the grounds of the motion, but merely that they should be sufficiently stated to apprise the Court fairly as to movant's position with respect thereto.' VIRGINIA CAROLINA TIE & WOOD CO., INC. v. DUNBAR, ET AL., 4 Cir. 1939, 106 F. (2d) 383, 385. The basis of the motion was perfectly clear to both court and parties both in the trial court and upon his appeal."

The court below escaped the mandatory provisions of Rule 50(a) by referring to an oral colloquy between the trial judge and respondent's counsel, which the court said clearly indicated counsel's position to be that the evidence had not proved the allegations of negligence (R. 294). This colloquy, referred to by the Court below, was very brief, and we quote:

> The Court: "Why do you think, Mr. Irion, that as a matter of law directed verdict should be granted in this case? I will hear you on that."

Mr. Irion: "Because plaintiff has *alleged* that we took the flow bean or choke out of the well."

The Court: "That is a debatable question."

(R. 252). (Italics ours).

The above is the sum total of everything that was said by respondent's counsel in his argument on the motion, and we submit this is no argument or reason, whatsoever. Of course petitioners alleged that respondent took the flow bean or choke out of the well! What was said constituted only reiteration of what petitioners' complaint averred, and was a far cry from saying that "the evidence had not proven the allegations of the complaint". But, be this as it may, the rule requires the grounds to be contained in the written motion, and for good and sufficient reasons.

## II.

In order to point out the error of the lower court in holding the evidence insufficient to go to the jury, it will be necessary to briefly consider eight of the main facts submitted to the jury, under proper instructions, upon which we submit the evidence clearly preponderates in favor of petitioners.

### Fact Number One.

### Definition, Purpose, and Location of the Flow Bean or Choke.

In Paragraph 9 of petitioners' complaint (R. 4), they alleged that a choke was placed in the flow-line. Respondent admitted this fact in Paragraph 9 of its an-

swer (R. 16, 17). In Paragraph 10 of petitioners' complaint (R. 4, 5), they averred that a choke is a removable steel orifice or restriction placed in the flow-line from wells to restrict and control the rate of flow of gas and oil from wells, and to control the pressure; that it is a safety device used in keeping high-pressure oil and gas wells under control, *and to prevent them from blowing out and causing damage to persons and property. The allegations of fact contained in this paragraph were admitted by respondent in its answer, in Paragraph 10 thereof* (R. 17).

Mr. J. O. Hendricks, a witness for respondent and a member of the crew of Dowell, Inc., which acidized the well, testified:

Q. "What is the purpose of that choker other than in reducing this diameter from two inches to one-half?

A. "The flow from the well is through a two-inch connection, it comes out through an opening of this size and would at times, under great enough pressure, be large enough opening to make it very unsafe *for powerful flow with pressure—great pressure to come through this size pipe, so that is why the choke is made. It is a safety device—it cuts down, or restricts its flow so* that instead of passing through a pipe this big the choke restricts the flow down to one-half inch. There are other various graduations of chokers. In other words, it cuts down on the size of the pipe or connection so that the flow of gas or fluid can go through."

(R. 50). (Italics ours).

Mr. Chastain testified:

Q. "What is the purpose, Mr. Chastain, of this device we have called a choker?

A. "It is to lower—what we use it for is to lower the flow—to allow the flow to escape slow enough so that it will not blow out; in other words, to choke it down so that the pressure will not build up so quick.

Q. "To choke it down so the pressure will not be so much, or so great, on the equipment?

A. "Yes, sir.

Q. "It is a safety device?

A. "Yes, sir." (R. 98).

There is no doubt but that petitioners proved that Frank Jowers and members of his crew placed the choke in the flow-line. The respondent admitted this fact in Paragraph 9 of its answer (R. 16, 17), and the witnesses for both respondent and petitioners testified that it was placed in the line by Mr. Jowers and his crew members (R. 90, 92, 93).

**Fact Number Two.**

The Purpose and Procedure in Acidizing a High-pressure Gas Well.

In the production of oil and gas, a hole is drilled to the stratum that produces oil or gas. After the hole is drilled, casing is set. This is done by placing steel pipe in the hole, from the top to the bottom, and at the bottom this pipe is set in concrete—thus, the expression of "setting casing". The purpose of the casing and of the cement

is to block out of the hole any substances other than the oil or gas that is to be produced, and to prevent the hole from caving. Often the stratum that produces the gas or oil is porous limestone. Occasionally, the porosity of the limestone is tight and will not permit the free flow of oil or gas, in which case, if hydrochloric acid is applied, it will react on the limestone by eating back into it, thereby increasing the porosity, enlarging the space through which the gas or oil must flow into the well.

Inside the casing above referred to, a small string of pipe is placed and run to the bottom of the well, or to the point where it is cemented. This is known as the tubing. Both the tubing and the casing are closed at the top by a series of valves and fittings known as a Christmas tree, in such a way that fluids may be injected into either the casing or tubing and, by means of pumps and pressure, forced to the bottom of the well, through the tubing and up out of the well through the casing, or vice versa. In acidizing a well, the problem involved is to place the acid in the limestone structure and force it back into the structure so that it may perform its work. This involves displacing the fluid, water, mud and slush that usually fill both the casing and the tubing, and putting in its place, at the proper point, the acid. Generally, the outlet from the casing is known as the flow-line from the well. In this particular case, the well was acidized by the Dowell crew by forcing acid down the tubing to the limestone and thereby forcing the water, mud and slush already in the tubing

and casing out through the bottom of the tubing, back up through the casing, and out through the flow-line into the slush pit. It should be kept in mind that in this particular case the well was over one mile deep, approximately seven inches in diameter, and *therefore a great amount of water, slush, and mud had to be forced out through the flow-line and also through the choke, which was in the flow-line at the place designated hereinabove.* When the proper amount of acid (which, in this case, was 5,000 gallons) was placed in the tubing and followed with clear water, the operators, by controlling the pressure of the flow line which came out of the casing, and the pressure of the tubing, could properly spot the acid.

The above is the purpose and procedure in acidizing a well. (R. 43, 44, 203).

**Fact Number Three.**

Cause of the Death of Frank Jowers.

Mr. Wenk, foreman of the acidizing crew, told Mr. Thomas (tool-pusher for Penrod) that the well was ready to be brought in, that the acidizing was completed; and Mr. Thomas instructed Mr. Jowers to bring the well in, meaning to open the valve connecting the flow-line with the casing and let the well blow in. Mr. Jowers followed the instructions. He opened the valve and the well started to flow, making a definite roar as the gas was coming out. The pipe and fittings, immediately downstream from where the choke should have been, broke at the first weak point downstream from the choke, the well went wild, and Frank Jowers was killed! (R. 47, 48, 81, 82, 191, 192).

**Fact Number Four.**

**The Choke Was Placed in the Flow-Line as a Safety Device. Had It Not Been Taken Out, the Well Would Not Have Gone Wild.**

The uncontradicted testimony is that the choke, the choke nipple (into which the choke was inserted), and all connections from the choke to the well, were made of the strongest material known to the oil and gas industry, and that the connections and fittings downstream from the choke (that is, from the choke to the slush pit) were made of material of a lesser strength. (R. 64, 65, 66, 191, 192, 194, 201).

Mr. Thomas, respondent's witness, testified that, in his opinion, the blow-out would not have occurred had the choke been in the flow-line (R. 191, 192, 194, 201).

**Fact Number Five.**

**The Choke Was Removed from the Flow-Line After It Had Been Put in by Frank Jowers and His Crew.**

When the well blew out, broke its connections and went wild, there was great excitement. Frank Jowers was in the pit—dead, no doubt—gas in tremendous volume was escaping, and there was imminent danger of fire, which would not only destroy the well but all property near it! (R. 234) Everyone about the well was, of course, wondering what had caused the blow-out. It was hard to understand why it blew out, if the safety device was in the line, and therefore eminently important, as soon as the well was brought under control, to ascertain if the choke was in the line. It was impossible to investigate this fact

until the well was brought under control because, while the well was wild, one could not reach the connection where the choke should have been.

Mr. J. H. Poole, who worked for the Placid Oil Company (owner of the well), was instructed and ordered by his superiors to ascertain whether or not the choke was in the choke nipple, as soon as the well was brought under control and he was able to get to the point where the choke should have been. He found the device was missing from its orifice (R. 67, 68).

**Fact Number Six.**

**The Agents and Employees of Dowell, Inc., Had Charge of the Well and Control of It During the Time That It Was Being Acidized.**

Mr. Hall, a member of the acidizing crew, testified:

Q. "After you complete the job you take the equipment down?

A. "Yes, sir.

Q. "And that calls for work by all members of the crew?

A. "Yes, sir.

Q. "*Then you turn the well over to the drilling crew?*

Q. "*Yes, sir.* (R. 58).

Q. "Now, during the time you were doing this work, the Dowell men were in and around the cellar all the time?

A. "Yes, sir.

THE COURT:

Q. *"As a general proposition, Mr. Hall, is it the custom that the acidizing crew turns the well over to the other crew to bring it in?*

THE WITNESS:

A. "Yes, sir." (R. 62).

Mr. J. H. Poole testified:

Q. *"Who had charge of the well while it was being acidized?*

A. *"Mr. Herbert Wenk.*

Q. *"He was the foreman of the Dowell, Inc., acidizing crew?*

A. *"Yes, sir.*

Q. *"After the acidization of the well was completed, and their material taken from the well, who was then in charge?*

A. "J. W. Thomas." (R. 76, 77).

Mr. J. W. Thomas was tool-pusher and foreman for Penrod Drilling Company. (R. 181, 182). Mr. V. F. Chastain testified that while Dowell, Inc. were acidizing the well, the drilling crew had nothing to do with it (R. 80). Mr. Simmons, a member of the Penrod crew, stated that Mr. Jowers told him to stay close because he (Jowers) *would need him when the acidizing crew got through* (R. 93). Mr. Simmons testified: "It was a good while —when he got through *the acidizing crew* took over. He did not go back until they got through." (R. 124). Mr. Thomas was asked the following question: "And then it is up to the tool pusher and the driller to take over, is that

right?" His answer was: "That is the custom" (R. 188). He was also asked: "And Jowers' crew was taking over as the Dowell crew were finishing?" and his answer was: "That would be something like it" (R. 189).

Mr. J. P. Pruitt, respondent's witness, said:

Q. "All the men were in and out of the cellar?
A. "Yes, sir.

Q. "*The Dowell men?*
A. "*Yes, sir.*

Q. "*Throughout the whole time?*
A. "*Yes, sir.*" (R. 217).

Mr. Wallace LeBlanc, also respondent's witness, testified:

Q. "When you were connecting and disconnecting the equipment there, the crew, including yourself, was in and out of the cellar?
A. "We were in and around the Christmas tree, yes, sir.

Q. "Is that in the cellar?
A. "Yes, sir." (R. 219).

Thus, it will be seen that the Dowell crew took over and had charge of the well during the time it was being acidized. During this time, let us see where the drilling crew was.

The drilling crew was composed of five men: Mr. Jowers, the driller; Mr. Chastain, the derrick man; Mr.

Simmons, a roughneck; Mr. Nettles, a roughneck; and Mr. Haynes, the boiler man. Mr. Chastain had gone to another well to get certain reports out of the car belonging to Mr. Thomas (R. 80). Mr. Haynes, the boiler man, was at the boiler, pumping water, and attending to the boiler (R. 89, 184). Mr. Nettles was at the rig a part of the time, at the boiler, and eating supper (R. 90). Mr. Jowers and Mr. Simmons stayed around the big truck while the acid was being put in (R. 95).

The removal of the choke required only a minute; and the tool used for this operation was on a sill in close proximity to this device (Hendricks, R. 50; Thomas, R. 194, 197). Therefore, it seems logical to conclude that the jury found the Dowell crew had the sole opportunity to have removed the choke.

**Fact Number Seven.**

The Acidizing Crew Had a Reason for Taking the Choke Out.

In properly placing the acid at the bottom of the well, it becomes necessary to expel the water, mud and slush out of the tubing and the casing, through the flow-line; and, if the choke is in the flow-line, through the choke. The casing in this well was 6-5/8 inches in diameter (R. 75). The well was 6,000 feet deep, which meant a volume of water, mud and slush approximately 6-5/8 inches in diameter and over one mile deep, to be dispelled through a half-inch choke.

Mr. Hendricks, a member of the acidizing crew, testified:

Q. "If you were to take the choke out of the choke nipple and remove it, that would permit the fluid in the casing to pass out into the slush pit more quickly, would it not?

A. "Yes, sir." (R. 52).

Mr. Chastain, who had been working around oil and gas wells since 1923 (R. 78) testified that it was customary to take the choke out and that most people do it *because they can get the acid in and do the work much faster* (R. 81).

Mr. Hall testified:

Q. "When the choke is in there, is it not a fact that the water, slush, and other foreign matter has to move in to the casing flow-line and out into the slush pit, and it would move more slowly with the choke in the nipple? Is that true?

A. "Yes, sir." (R. 60).

Q. "All right, in other words, you told Mr. Swift substantially, 'while we are putting acid into a well, the *usual* procedure is to remove the choke so we can go in faster with the acid, *the reason being that the water displaced will have to go out through the choke, making it necessary to put the acid in slower.* With the acid in the well, the choke is usually put back in. I did not see at any time a choke being put in. The

situation with regard to the choke I assume was normal, as this well was hooked up in the *usual* manner'. Is that about what you said?

A. "Yes, sir." (R. 61).

It will be noted that Hall had already testified that the removal of the choke would have expedited his employer's work, before reference was made to the statement taken by Swift. Hall also testified:

A. "We were handling water and I recall right, about the only time they ever remove the choker is when they have mud in the well.

Q. "That is to get the mud out?

A. "Yes, sir.

Q. "That is all." (R. 228).

Q. "You went on and said the water displaced would have to go through the choker, making it necessary to put the acid in slower, is that right?

A. "Yes, sir.

Q. "You made that statement almost a year ago, is that right?

A. "Yes, sir.

Q. "With the acid in the well, the choker is usually put back in, is that right?

A. "Yes, sir." (R. 229).

Respondent's witness, Hendricks, would not deny having made a statement to one Donald C. Swift, shortly

after the accident, that it would have been desirable to have taken out the choke if the pump had been attached to the casing bleed-off (R. 112); and Swift testified:

Q. "I will ask you if Mr. Hendricks when he was interviewed April 23rd, 1946, said 'we did hook up a pump to one of the casing wing valves. The purpose of this pump is to give a better control over the spotting of the acid. I don't recall which of the two casing wing valves it was hooked to; had it been hooked to the casing bleed-off it would have been desirous to take out the choke'; did he say that?"

A. "That is correct." (R. 132).

And there was evidence, also, from respondent's witness, Wenk, that one of the pumps was attached to this connection:

A. "Yes, sir, Dowell's tubing contact was made at this point (indicating). Then we tied another pump to the left-hand side of the casing; one left-hand side facing the tree—opposite from the flow-line, and this pump connection was tied in behind the closed gate and was not used until all the acid had been put in the well through the tubing." (R. 203).

That there was mud in the well during the acidization process and subsequent thereto, seems clear from the

testimony of Dr. Claude Ferguson, J. H. Poole, O. W. Lyons and J. P. Pruitt. Ferguson testified:

A. "I could not recognize him; he was really covered up in mud, water, slush, oil and the like. (R. 113).

* * * *

A. "* * * They said it was done so quick and the man was just completely submerged in the mud and slush and covered up. You could not tell whether it was a human being or a brute, as I said before, and was so completely in the mud —his face and all—some of his clothes were torn and gone. (R. 120).

* * * *

A. "I believe there was something of that kind; he was so muddy and oily we absolutely could not get at him as we would have liked to do." (R. 121).

There were at least three good reasons, as testified to by the above witnesses, for the acidizing crew to have removed the choke:

(a) To have expedited the placement of the acid while it was being forced through the tubing;

(b) To have eliminated the mud and slush from the well;

(c) If the connection was made to the bleed-off.

O. W. Lyons, superintendent of respondent's operations, who testified as an expert, in being questioned by respondent's counsel in an effort to show that Dowell, Inc.'s

supervision of the well ended after the acid was placed, clearly indicated that mud or "stuff" could be expected. He said:

Q. "Of course, you bring your pilot up, but I mean slush or mud, or gas, or anything else; do you have anything to do with the lifting of the stuff that is in the well, or that comes into the well out of the earth?

A. "We do not." (R. 158).

Also see Poole, (R. 67, 68); Pruitt (R. 216).

**Fact Number Eight.**

The Drilling Crew Did Not Take Out the Choke and Had No Reason for Doing So.

Mr. Haynes, the boiler man, did not take it out because he was at the boiler, pumping water, and attending to the boilers (R. 89, 184); Jowers did not take it out, since he had put it in, on orders from his superior, for the purpose of protecting his life and the lives of the men under him (R. 93-95); Simmons, Nettles, and Chastain did not take it out, since it was installed for their safety and they would have had no reason to take it out (R. 71, 91, 96); Thomas did not take it out, nor did he give any orders for it to be taken out (R. 185); J. H. Poole was not there and had no opportunity to take it out (R. 64).

The undisputed facts are:

1. That the choke was inserted in its proper position in the line by Jowers, at the instruction of Thomas, either prior to, or during, the acidization process (the exact time it was placed there being in dispute).

2. That the choke is a safety device, and the subject accident would not have occurred had it been in place.
3. That the choke was not found in the line after the explosion.
4. That the choke was removed by some human agency.

When the evidence is viewed in the strongest and most favorable manner to appellee, as it should have been (*Johnson v. Dierks Lumber & Coal Co.*, 130 F. (2d) 115, C.C.A., Ark., 1942; *U. S. v. Brewer*, 87 F. (2d) 672, C.C.A., Iowa, 1937; *Reading Co. v. Layton*, 92 F. (2d) 289, C.C.A., N. J., 1937;*Columbia Casualty Co. v. Lyle*, 81 F. (2d) 281, C.C.A., Texas, 1936, 5th Cir.; *Amer. Nat. Bank & Trust Co. of Chicago v. U. S.*, 104 F. (2d) 783, C.C.A., Ill., 1939; *Massachusetts Bonding & Insurance Co. v. Hudspeth*, 94 F. (2d) 467, C.C.A., Ark., 1938; *Long v. London & Lancashire Indemnity Co. of America*, 119 F. (2d) 628, C.C.A., Ohio, 1941; *Roe v. St. Louis, Southwestern Ry. Co.*, 168 S. W. (2d) 1112, 205 Ark. 416, Ark., 1943; *Clay County Cotton Co. v. Home Life Ins. Co. of New York*, 113 F. (2d) 856, C.C.A., Ark., 1940; *Johnson v. J. H. Yost Lumber Co.*, 117 F. (2d) 53, C.C.A., Neb. 1941; *Commercial Trust Co. of New Jersey v. Kealey*, 92 F. (2d) 397, C.C.A., Va., 1937) the following findings of fact and inferences therefrom seem irresistible:

1. That respondent, specialists in the work undertaken by it, had actual control, over its operations, from the beginning of the acidization process until the well was turned back to the superintendent, Thomas.

2. That members of the respondent's crew had the sole opportunity to have removed the choke.

3. That the Dowell crew alone had the sole motive for having removed it.

**Opinion of Circuit Court.**

At this point, we shall briefly digest the opinion below which held the evidence insufficient to go to the jury.

In the very beginning, it seems significant to us, if the reviewable court was firm in its opinion on this phase of the case, it would have been unnecessary to have considered the instructions of the trial judge *(infra)* but, instead, ended the litigation by reversing and rendering. This lack of conviction on the part of the reviewable court appears throughout its opinion, as we will now attempt to reveal.

The lower court, after stating that a choke was used to prevent possible explosions of the kind that occurred in this case, buttressed its final conclusion that the evidence was insufficient to support the verdict on the following facts, to-wit:

(a) That before, or during, acidization of the well, Thomas (Penrod's tool-pusher) ordered the choke placed in the flow-line for the purpose of building up pressure in the well—"and that they did so". (R. 295).

We have read and re-read, in vain, the testimony of Thomas, and utterly fail to find any statement by him, or inference from any statement, supporting this finding.

To the contrary, he testified that the choke was placed in the well to prevent the very blowout which occurred and killed Frank Jowers (R. 192). (Also see Hendricks, R. 50, and Chastain, R. 98).

(b) That in some cases a choke in the flow-line may retard the process of acidizing a well, but in the type of subject well, a choke was essential if "sufficient pressure to do the job was to be maintained". (R. 295).

It is significant that, immediately following the above finding of fact, the Court concluded that whether the sole purpose of the choke is to act as a safety device "cannot be sustained", and then continued "*but it is just upon this point that confusion arises*". That there was confusion on this point in the record is, in our opinion, an overstatement; yet, if there was, resolution of such confusion by a jury is definitive. The Court continued to support its factual finding in this regard by reference to respondent's witness, Hall, who, the Court said, joined all other witnesses in leaving no doubt but that the choke was necessary in the flow-line in this particular well, to maintain adequate pressure. Again, we seach the record in vain to find any mention of this fact in the testimony of Hall (R. 54-64, 226-242).

The only testimony on this score is that of O. W. Lyons, respondent's superintendent, and Herbert Wenk, its foreman, that it was necessary to have a choke in the flow-line because Thomas (Penrod's tool-pusher) would

not permit the pressure to be held back through use of the gate-valve. Wenk testified he discussed this with Thomas, and they decided to place a choke in the well (R. 199), but Thomas denied any such conversation (R. 183). Of course, the choke is placed in the well to control pressure because, by controlling pressure, a blow-out is prevented. This is alleged in petitioners' complaint (R.4) and admitted by respondent (R. 17).

> (c) If there was mud and slush in the well, the presence of a choke in the line would have hindered the flow of mud and slush and so retarded the operation; but that the well was full of water, and not mud or slush, and thus the use of a choke was necessary to retard the flow of water as it was displaced by acid (R. 295-6).

Admission by the lower court that the presence of mud and slush in the well would have retarded operations was almost necessary in view of the admission, by respondent's counsel in his supplemental brief to the lower court, where, at page six, he said:

> "Had there been mud and slush in the well, and had there been a choke in the line, to remove the mud and slush it would have helped to have removed the choke".

We submit, the record is replete with evidence that there was mud and slush in the well, just prior to the explosion, as heretofore indicated, and this fact was resolved by the jury in their verdict (p. 27, supra).

(d) That the testimony of E. F. Hall, as to motive in removing the choke, should be disregarded because in Hall's statement to Swift, and in his testimony, it was probable that he was referring to the process of acidizing wells, in general, and not to the process of acidizing this particular well. (R. 296).

It is true Hall's statement was not offered in evidence, since, with the exception of the quoted part, the statement was otherwise irrelevant. However, no demand was made by the respondent to have it filed, and, as we see it, there is no basis for the assumption by the lower court that the quoted sentences dealt with the acidization of wells in general—to the very contrary, the assumption is more reasonable that Hall was talking about the well that exploded, to-wit: The Dee Van Zandt, No. 1. The accident occurred in October, 1945. Swift, an adjuster for the Hartford Accident & Indemnity Company, intervenor, took the statement a few months later (the exact date is not revealed by the record). Swift was, presumably, interested in only one well, *i. e.*, the Dee Van Zandt, No. 1, which was the cause of Jowers' death and the liability therefrom imposed on his company. Hall knew, when he made the statement, that Jowers had been killed on this well, and that the inquiry by Swift was to ascertain the facts concerning the accident and Jowers' death. There was no reason for either Swift or Hall to have been interested in the general practice of Dowell, Inc., in the acidization of

other wells, but, on the other hand, there was an interest in both of these parties as to the facts with reference to the Dee Van Zandt, No. 1. So we submit that the inference that Hall was speaking of other wells is not justified. Moreover, Hall not only admitted making the statement to Swift at a time when his memory was probably more accurate than at the time of the trial, but practically admitted, when his testimony is viewed as a whole, to the same facts as a witness on the trial of the case. Therefore, we fail to see why the jury should not have been impressed by Hall's testimony and the statement that he made to Swift. The lower court concedes this, to some extent, in the final sentence of its remarks relating to Hall's testimony, when it said:

> "*The jury may have been impressed by this, and and although we cannot say there was a total absence of evidence tending to show a reason for appellant to have removed the choke, we think there was not sufficient evidence on the point to go to the jury.*" (Italics ours).

(e) That the uncontradicted evidence disclosed that Thomas, Penrod's man, was in general charge of the drilling, acidizing and bringing in of the well. (R. 298).

This finding of fact is directly in the teeth of page after page of the record, from which the jury was almost obliged to make a finding that Dowell, Inc., was in actual charge and exclusive control during the entire acidization process. In the first place, Dowell, Inc. had special equipment, trained men, and the particular "know-how" to per-

form this work. O. W. Lyons, respondent's witness and superintendent, testified:

Q. "Under a foreman by the name of Wenk—Mr. Wenk?

A. "Yes, sir.

Q. "Men who are specialists in this particular work?

A. "Yes, sir.

Q. "You paid the men?

A. "Yes, sir. (R. 39).

Q. "Then we will assume that all of the members of the crew had considerable experience of this type of work that were on the well where Mr. Jowers was killed?

A. "Yes, sir. (R. 40).

Q. "When you say foreman in charge, do you mean the tool pusher or the driller?

A. "The tool pusher is in charge of the well and he is the supervisor in charge of the well.

Q. "He is over the drillers, is that right?

A. "That is correct." (R. 157).

The last mentioned testimony of this witness was elicited by respondent's counsel, in an effort to have the witness conclude that Thomas was in charge throughout the operation; but, as indicated, he failed. (Also see Herbert Wenk, R. 76, 77, 165, 166, 208, 209, 212; J. A. Simmons, R. 125; O. W. Lyons, R. 143, 144, 147, 148, 153, 154; John W. Thomas, R. 188, 190, 191).

The fact that the foreman obtained certain data from Penrod's representative, Thomas, as to the amount of acid he thought would be required, and as to other peculiar characteristics of the well (R. 144, 147) does not deter from Dowell's control of the work which they had contracted with Penrod to perform (pp. 20-22, supra).

(f) That the testimony of H. T. Poole, in rebuttal, offered to impeach the witness Hall that the latter had made a statement that "we took the choker out" is of no probative value, only affected the credibility of the witness impeached. (R. 300).

With the above statement of the lower court, we agree. Poole was only offered as an impeaching witness, for the purpose of attacking the credibility of Hall. However, we cannot agree with the further conclusions of fact by the lower court when it continued by saying that there was no way of knowing whether the jury gave probative weight to Poole's testimony (R. 300).

The trial judge gave the exact charge requested by respondent's counsel on this point, appearing at p. 257 of the record:

1. You are instructed that the disbelief of witnesses by you is a valid ground for refusing to consider their testimony in formulating a conclusion on the facts of any given case, *but it cannot be used as a means to supplant affirmative proof where none exists.* (Italics ours).

In fact, the trial judge gave every charge requested by respondent, and, at the conclusion of the charge, in re-

sponse to a question of the Court to counsel as to whether he had omitted anything from his charge, respondent's counsel answered:

"Nothing, no, sir." (R. 262).

As a result of the Court's charge referred to, petitioners' counsel could not, and did not, argue that Poole's testimony be considered as affirmative proof on the question of who took the choke out. At this point, the lower court further commented, "nor is there any evidence excluding the possibility that one of the Penrod men removed it, or that it might have been blown out by the explosion." All the members of the Penrod crew testified they did not remove the choke (supra, page 28). The fact that the Court intimates it might have been blown out by the explosion clearly evidences and forces the conclusion that the lower court totally overlooked the admitted facts, *i. e.*, that the explosion occurred on the downstream side of the choker connection, or the slush-pit side, and that the choker connection was wholly intact after the explosion. There has never been any dispute or contention by anyone to the contrary. In other words, the break occurred on the far side, or downstream or slush-pit side, of the choker connection, in the piping which was of much lesser strength than the choker and piping on the well-side or upstream side of the connection. Chastain testified:

Q. "At what point did the line break, Mr. Chastain, in reference to the nipple?

A. "Well, it broke just in front of it, there is a union there that goes on the end here and it pulled off the end of pipe."

Q. "What do you have to say as to the comparative strength of the connections from the choke nipple back to the casing, and the connection from the choke nipple to the slush pit?

A. "All of the things we used on the well were the highest pressure stuff we could get; the pipe we had out there I don't know what it was—I don't know the relative strength of that pipe. I do know we had good connections behind it though.

Q. "It broke downstream on the choke?

A. "Away from the well, yes, sir." (R. 80, 81).

(Also see R. 64, 65, 66, 191, 192, 194, 201). Thomas also testified that the explosion would not have occurred had the choke been in the flow-line (R. 192, 194, 201), so again a question solely for the jury was presented and passed upon.

In *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, this Court said:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body.
>
> * * *
>
> "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

## III.

### *Res Ipsa Loquitur.*

Thomas testified:

Q. "In other words, when you have these high pressure gas wells rigged up like this one was rigged up, that Mr. Jowers was working on, with the choker in the choke nipple, you never saw this thing happen, did you?

A. "I never blew one out before." (R. 194).

From the facts above indicated, Dowell, Inc., had such explicit control over the instrumentalities or properties out of which the accident arose, during the progress of their work and during which period the choker was removed, as to have warranted an inference of negligence, in accordance with the reasoning of this Court in *Jesionowski v. Boston & M. R.*, 329 U. S. 452, 169 A.L.R. 947, 91 L. Ed. 355, 67 S. Ct. 401; *Sweeney v. Erving*, 229 U. S. 233, 57 L. Ed. 815, 33 S. Ct. 416; *Johnson v. United States*, 92 L. Ed. 360, and the Supreme Court of Louisiana in *Hake v. Air Reduction Co.*, 210 La. 810, 28 So. (2d) 441.

## IV.

We quote from the opinion of the reviewable court:

> "This brings us to a consideration of that part of the charge against which appellants most strenuously complain. The paragraph in question reads as follows:
>
> 'I might say this, if you reach the question of an amount, the law of the State of Louisiana applies

and this is not to control you but I might indicate to you that in cases in Louisiana of somewhat similar character—some $10,000 or $15,000, say, *I do not say that it is too high or too low*, but it has been allowed; you have in this case the wife and her individual case of her own, and each of the three children. You have a case here just as if you had four people to deal with instead of one person, each one of whom is entitled to a separate consideration.' (Italics ours).

"We think such a charge was highly prejudicial and calculated to mislead the jury." (R. 304).

We agree, the charge was highly prejudicial—but not to the respondent! It was prejudicial to petitioners because, under the facts, the jury would most probably have rendered a larger verdict, had it not been for this charge. This presumption is probable, because the jury did award the limit of the amount mentioned by the trial judge—$15,000.00—to each of petitioners. Respondent sat idly by, availing itself of a *ceiling* placed upon its liability by the trial judge, awaiting the jury's verdict; then, when it went against them, raised this objection, for the first time, in the appellate court.

Rule 10, of the Fifth Circuit Court of Appeals, provides:

"1. Federal Rules for Civil Procedure, adopted by the Supreme Court pursuant to Act of June 19th, 1934, Nos. 46, 50, 51, 73, 74, 75 and 76, are adopted as rules of this Court in cases in which they apply."

And Rule 51, of Federal Rules for Civil Procedure, 28 U.S.C.A., following section 723(c) provides:

> "No party may assign as error the giving, or the failure to give, an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

The lower court circumvented not only its own rules, but Rule 51, by admitting that such an error could not be raised by appellant (although, in fact, it was raised by appellant) by stating it could take cognizance of such an error on its own motion (R.306)). We submit, since the Fifth Circuit has officially adopted this particular rule, that the Court cannot permit respondent to acccomplish, by indirection, that which it has been prohibited to do directly.

The ancient rule of law supported by almost unanimous authority in the federal courts is that no error in giving, or failing to give, an instruction to the jury, can be availed of in the absence of specific objections thereto. This Court expresses the correct view of this Court and of inferior federal appellate courts, in *Pennsylvania R. R. Co. v. Minds*, 250 U. S. 368; 39 S. Ct. 531; 63 L. Ed. 1039, wherein it is said:

> "Parties may not rest content with the procedure of a trial, saving general exceptions to be made the basis of error proceedings, when they might have had all they were entitled to by the action of the trial court had its attention been seasonably called to the matter."

(*Palmer v. Hoffman*, 318 U. S. 109, 63 S. Ct. 477, 87 L. Ed. 645, 144 A.L.R. 719; *Mill Owners' Mutual Fire Insurance Co. v. Kelly, et al.*, 141 Fed. (2d) 763, C.C.A. 8, 1944; *Standard Oil Co. v. Burleson*, 117 Fed. (2d) 414, C.C.A. 6, 1941). And the lower court, through Judge McCord, in *Western Fire Insurance Company of Ft. Scott, Kansas, v. Word, et al.*, 131 F. (2d) 543, as late as 1942, said:

> "* * * It is a rule of law so old that the memory of man runneth not to the contrary that one may not sit by without objection to rulings or instructions, and then after verdict and judgment, and when it is too late for the court to change its rulings or charge, come forward with objections on appeal and seek to put the court in error. *Standard Oil Co. v. Burleson*, 5 Cir., 117 F. (2d) 412, 414; *Taylor v. United States*, 5 Cir., 71 F. (2d) 76; *Pennsylvania R. Co. v. Minds*, 250 U. S. 368, 374, 39 S. Ct. 531, 63 L. Ed. 1039."

Since rules and principles of law are not infallible, we find an exception to even this ancient and established principle of procedure. However, these exceptions occur very infrequently and only under unusual circumstances, such as where laws, state or federal, have intervened between the date of trial and hearing on appeal. In *Trapp v. Metropolitan Life Insurance Co.*, 70 F. (2d) 976 (C.C.A. 8, 1934), certiorari denied by this Court, the law of the case was changed by a decision of a state court of last resort, subsequent to the trial. The record contained all the facts necessary to reach a decision. The Circuit Court, regardless of the fact that the question of law herein presented had not been urged before the trial court, gave judg-

ment based on the intervening interpretation, and in doing so, said:

> " 'This court sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed.'
>
> "The record made in the court below contains all of the facts essential to a correct determination of this controversy. The instruction of a verdict favorable to the defendant is assigned as error, and section 5741 of the Missouri Statutes, as interpreted by the case of *Gooch v. Metropolitan Life Insurance Co.*, supra (Mo. Sup.) 61 S. W. (2d) 704, is urged upon as a ground for reversal.
>
> "We regard this case as an *exceptional* one and analogous to those in which a change of the law after trial has required a reversal of a judgment right when rendered. We have no intention of departing from the general rule that this court will not review questions not presented to nor passed upon by the lower court, but we think it is our duty to recognize the changed situation and 'to give effect to a matter arising since its judgment and bearing directly upon the right disposition of the case.' *Gulf, Colorado & Santa Fe Ry. Co. v. Dennis*, supra, 224 U. S. 503, 507, 32 S. Ct. 542, 543, 56 L. Ed. 860."

The Eighth Circuit predicated its decision on the following cases: *A. Santaella & Co. v. Otto F. Lange Co.* (C.C.A. 8) 155 F. 719; *Seufert Bros. Co. v. Lucas* (C.C.A. 9) 44 F. (2d) 528; *United States v. The Schooner Peggy*, 1 Cranch

49, 2 L. Ed. 103; *Duignan v. United States, et al.*, 274 U. S. 195, 47 S. Ct. 566, 71 L. Ed. 996. A review of the cases cited indicates that it is only under exceptional circumstances that federal courts depart from the general rule, circumstances similar to those which prevailed in the *Trapp* decision.

In *Pierce v. United States*, 255 U. S. 498, 65 L. Ed. 697 (1921) this Court held that a Circuit Court should have considered the improper allowance of interest on a judgment submitted by the trial court, even though not assigned as error, *where the rules of this circuit provided that the court might notice a plain error not assigned or specified.* But, the Fifth Circuit has the very opposite rule, as above indicated. Moreover, the error complained of, in the cited case, was in the category of an inadvertence.

In support of its action, the reviewable court cited *Shimabukuro v. Nagayama*, a District Court case, decided in 1944, 140 F. (2d) 13, which case, in turn, relied upon this Court's decision in *Hormel v. Helvering*, (1941) 312 U. S. 552, 61 S. Ct. 719, 85 L. Ed. 1037. This case went from the Board of Tax Appeals to the Circuit Court of Appeals on the question of whether or not income from a trust was taxable to an individual as his income. The Commissioner, before the Board of Tax Appeals, maintained that the income was taxable under Sec. 166 or 167 of the Revenue Act. In the C.C.A. the Commissioner abandoned the reliance on Sec. 166 and for the first time argued that the income was taxable to the individual under Sec. 22(a). Taxpayer argued that the question of applicability of Sec. 22(a) was not before the C.C.A. because

it had not been raised in trial of case. The C.C.A. held that it could with propriety consider the applicability of Sec. 22(a). This Court affirmed.

The holding in *Hormel v. Helvering* was based on the statute which gave the C.C.A. jurisdiction over appeals from the Board of Tax Appeals. The statute gave the C.C.A. the power to "affirm . . . modify or reverse the decision of the Board with or without remanding the case for a rehearing, *as justice may require.*" Note that this statute applies only to appeals from the Board of Tax Appeals and not to jurisdiction of the C.C.A. on questions coming up from the district court.

This Court also cited *Blair v. Oesterlein Machine Co.*, 275 U. S. 220, 72 L. Ed. 249, 48 S. Ct. 87 (1927), for the proposition that in exceptional cases the appellate court may notice for the first time questions of law which were neither pressed nor passed upon by the court or administrative agency below where injustice might otherwise result. This case contained dicta statement to this effect:

> "It is only *in exceptional cases*, and then only in cases from the federal courts, that questions not pressed or passed upon below are considered here. *Duignan v. U. S.*, 274 U. S. 195, 71 L. Ed. 996, 47 S. Ct. 566." (Italics ours).

In the *Blair* case, the Court refused to pass upon a question which was not raised before the Board of Tax Appeals from whence this case came, through the C.C.A.

In *Duignan v. United States* (Supra), this Court stated the rule that it is only in exceptional cases that

questions not pressed below can be reviewed on appeal. In this case, also, this Court refused to consider questions raised for the first time before it. About twenty cases are cited in support of the rule therein set out.

In a Sixth Circuit decision (1944), *Van House v. Acorn Steel Co.*, 144 F. (2d) 204, it was held that the failure to instruct the jury on the quantum of damages, where no exceptions were taken thereto and no objections raised, did not present such an "exceptional case" so as to permit the C.C.A. to notice, on its own motion, a defect in the instructions, the court holding that the sufficiency of the charge given presented no question on appeal.

The purpose of Rule 51 is well expressed by the writer of the opinion in the Eighth Circuit, in *Palmer v. Miller*, 145 F. (2d) 926, where it was said:

> "The purpose of the rule requiring that objections to the instructions of the court be taken before the jury retires to consider its verdict, is not to disable the court from thereafter correcting an erroneous instruction, but is to prevent a party, after verdict, from taking advantage of the giving of an erroneous instruction to which he failed to call attention in time to enable the court to correct. As the Supreme Court of the United States said in *Palmer v. Hoffman*, 318 U. S. 109, 119, 63 S. Ct. 477, 483, 87 I. Ed. 645, 144 A.L.R. 719; 'Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial.' "

The unfairness of the present situation is further accentuated by the fact that had respondent felt that the jury's award was excessive, or engendered by bias or prejudice, it could have sought relief through the offices of a motion for new trial, or some other motion after verdict. Had this been done and substantiated to the trial judge's satisfaction, he could have forced a remittitur or even granted a new trial. Motion for new trial was filed by respondent—but not one word of complaint of the jury's award or of the instruction above (R. 271 to 274). Citing of the error alleged therein for the first time in the appellate court was an afterthought, and born of desperation.

If the present opinion on this point becomes law, a perfect trap is set for the unwary—for a slothful or ingenious litigant may take undue advantage of his opponent; chaos will ensue, juries' awards and the trial courts' judgments will become weak, uncertain and ineffective; litigation will become protracted, and injustice will prevail.

WHEREFORE, petitioners respectfully pray that certiorari be granted.

Respectfully submitted,

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# Supreme Court of the United States

**OCTOBER TERM, 1947.**

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## No. 763

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**MRS. FRANK JOWERS, ET AL.,**

**versus**

**DOWELL, INCORPORATED.**

---

**BRIEF OF RESPONDENT IN OPPOSITION TO APPLICATION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.**

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*MAY IT PLEASE THE COURT:*

For the sake of brevity, we will refer to petitioner's reasons for the issuance of a writ of certiorari in the order presented by her, on pp. 6 and 7 of her application, and shall not repeat them here.

Reasons one and two relate to the same subject and will be treated together. This objection is highly techni-

cal. Petitioner, herself, has proceeded in violation of the Federal Rules of Civil Procedure.

Petitioner at no time objected to the form of the motion for a directed verdict in the District Court, but argued and briefed the questions raised. Her failure to object was a waiver. Federal Rules of Civil Procedure 12 and 46, and particularly Rule 15 (b). As a matter of fact, her objection was an afterthought, first raised in a **supplemental** brief in the Circuit Court of Appeals.

However, the Circuit Court considered the question as to whether or not defendant had filed a proper motion for a directed verdict and concluded from the record, as it was in its power to do, that a proper motion had been filed. Petitioner here does not question this power so used by the Circuit Court as being in abuse of its discretion.

Petitioner is, of course, in error in urging that the decision of the Circuit Court of Appeals for the Fifth Circuit in this case is contrary to decisions of the Circuit Court of Appeals for the Fourth and Third Circuits in *Virginia Carolina Tie & Wood Co. v. Dunbar,* 106 F. 2d 383 (1939) and *Ryan Distributing Co. v. Caley,* 147 F. 2d 138 (1945), respectively.

Since a mere reading of the three cases will demonstrate that the decision of the Court of Appeals in this case is in accord with the decisions cited by petitioner, we shall not lengthen this brief by quotations therefrom nor discussions thereof.

The third and fourth grounds of petitioner's application merely seek to have this Court review the facts to determine whether sufficient evidence had been adduced to permit the case to go to the jury, and to substitute its findings thereon for those of the Court of Appeals. The Court of Appeals reviewed the evidence solely to determine if petitioner had made out a sufficient case to be submitted to the jury. The Court of Appeals found that she had not, and the sole purpose of reasons three and four of the petition is to have this Court again review these facts. Since petitioner has been accorded a new trial, there is no merit in these requests.

Reasons five and six have been answered by the Supreme Court of the United States in its decision in *New York Central Railroad Company v. Johnson*, 279 U. S. 310, 318; 73 L. Ed. 706, 710; 49 S. Ct. 300 (1929).

The effect of the decision of the Court of Appeals in this case is to grant a new trial. It is not, and could not be argued that respondents failed to file, within the time prescribed, a motion to set aside the verdict of the jury and **a motion for a new trial,** with the reasons and grounds therefor set forth in full. The Court of Appeals merely remanded the case for a new trial.

This being true, it is submitted that the decision of the Court of Appeals is interlocutory, and while certiorari may be granted to review an interlocutory order, ordinarily this is not done. Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, page 623; *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*,

240 U. S. 251, 258; 60 L. Ed. 629, 633; 36 S. Ct. 269 (1916); *Hanover Star Milling Co. v. Metcalf*, 240 U. S. 403, 408, 409; 60 L. Ed. 713, 716; 36 S. Ct. 357 (1916), and *American Construction Company v. Jacksonville, etc. Railway Company*, 148 U. S. 372, 383, 384, 37 L. Ed. 486; 13 S. Ct. 758 (1893). These decisions are directly applicable to the present situation where the case goes back for an entirely new trial.

It is respectfully submitted that the decision of the Court of Appeals is an interlocutory decree; is in harmony with the jurisprudence of the Supreme Court and the other Courts of Appeals; no question of public importance is presented and the decision complained of is in full accord with applicable local law.

It is therefore submitted that the petition for writ of certiorari in this case should be denied.

Respectfully submitted,

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This is to certify that copies of this Brief have been served on opposing counsel on this the .... day of May, 1948.

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